

141 FERC ¶ 61,106
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

The Detroit Edison Company

Docket No. EC12-124-000

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued November 6, 2012)

1. On July 23, 2012, The Detroit Edison Company (Detroit Edison) filed an application seeking prospective authorization under section 203(a)(1) of the Federal Power Act (FPA)¹ and Part 33 of the Commission's regulations,² to transfer to International Transmission Company (ITC) certain jurisdictional assets that occurred in 2005 (2005 Disposition).
2. The Commission has reviewed the application under the Commission's Merger Policy Statement.³ As discussed below, we will authorize the 2005 Disposition on a prospective basis effective from the date of this order, as consistent with the public interest.

¹ 16 U.S.C. § 824b(a) (2006).

² 18 C.F.R. pt. 33 (2012).

³ See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). See also *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement). See also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). See also *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

I. Background

A. Description of Detroit Edison

3. Detroit Edison, a wholly-owned subsidiary of DTE Energy Company, is a public utility that engages in the generation and distribution of electricity in Michigan. Detroit Edison also provides retail electric service to customers in southeastern Michigan and engages in wholesale sales of electric energy in interstate commerce. It is subject to the jurisdiction of the Michigan Public Service Commission and the Commission. Detroit Edison has market-based rate authorization from the Commission⁴ and is a non-transmission owning member of Midwest Independent Transmission System Operator, Inc. (MISO).

B. Description of ITC

4. ITC, a wholly-owned subsidiary of ITC Holdings Corp., owns, operates, and maintains approximately 2,800 circuit miles of transmission lines, 17,000 transmission towers and poles and 155 stations and substations in southeast Michigan. It serves 5.1 million people. ITC is a transmission-owning member of MISO and provides transmission service under MISO's Open Access Transmission Tariff (OATT).

C. 2005 Disposition

5. Detroit Edison states that, in 2005, Detroit Edison transferred to ITC the following jurisdictional assets, valued at \$6,919,401: (1) Augusta 120 kV Stephens-Victor; (2) Spencer Substation 120 kV Circuits; (3) Alpha Substation; (4) Jewell Substation; (5) Tower drop into Ottawa Substation; (6) Tower drop into Lily Substation; and (7) Spencer Substation Circuit (2005 Disposition) and that, as part of the same transaction, ITC transferred certain distribution assets to Detroit Edison valued at \$8,396,574. Detroit Edison further states that, in 2007, in two separate transactions, Detroit Edison transferred to ITC certain additional Commission-jurisdictional assets consisting of circuit breakers, disconnect switches, steel structures and other assets. The net book value of the assets transferred in the first of the 2007 transactions was \$881,470, and the net book value of the assets transferred in the second of the 2007 transactions was \$1,226,314.⁵ On April 2, 2012, the Commission granted ITC prospective section 203 authorization in Docket No. EC12-48-000 to acquire the jurisdictional facilities

⁴ *Detroit Edison Co.*, 80 FERC ¶ 61,348 (1997).

⁵ Application at 4-6.

transferred by Detroit Edison in the 2005 and 2007 transactions.⁶ However, since Detroit Edison was not an applicant in that proceeding, the ITC 203 Order did not authorize Detroit Edison to dispose of its jurisdictional facilities in any of the three transactions.

6. Detroit Edison now seeks prospective section 203 authorization for the 2005 Disposition. Detroit Edison states that it was not required to seek prior authorization under section 203 to dispose of the jurisdictional facilities involved in the two 2007 transactions because the value of the assets transferred in those transactions, whether considered individually or in the aggregate, was below the applicable \$10,000,000 value threshold.⁷ Detroit Edison further states that authorization under section 203 was not required in connection with the transfer by ITC to Detroit Edison of distribution facilities as part of the 2005 transaction.⁸

D. Notice of Filing and Responsive Pleadings

7. Notice of the application was published in the *Federal Register*, 77 Fed. Reg. 45,348 (2012), with interventions and comments due on or before August 13, 2012. None was filed.

II. Discussion

A. Standard of Review Under Section 203

8. Section 203(a)(4) requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest.⁹ The Commission's analysis of whether a transaction will be consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.¹⁰ Section 203(a)(4) also requires the Commission, before it approves a transaction, to find that the transaction "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of

⁶ *International Transmission Company*, 139 FERC ¶ 61,003 (2012) (ITC 203 Order).

⁷ Application at 6. *See also* *International Transmission Company*, Section 203 Application, Docket No. EC12-48-000 (filed Dec. 14, 2011).

⁸ Application at 5.

⁹ 16 U.S.C. § 824b(a)(4) (2006).

¹⁰ *See* Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.”¹¹ The Commission’s regulations establish verification and informational requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or a pledge or encumbrance of utility assets.¹²

9. The 2005 Disposition occurred prior to the effective date of the amendment to section 203 enacted as part of the Energy Policy Act of 2005 (EPAAct).¹³ Prior to the enactment of EPAAct, section 203(a) provided, in relevant part:

No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of \$50,000 . . . without first having secured an order of the Commission authorizing it to do so . . .¹⁴

Accordingly, the 2005 Disposition was subject to the Commission’s jurisdiction under section 203(a) of the FPA, as in effect prior to enactment of EPAAct, because the value of the jurisdictional facilities Detroit Edison transferred to ITC was in excess of \$50,000.¹⁵ Nevertheless, because Detroit Edison is seeking prospective authorization for the 2005 Disposition, we will apply the standards set forth in section 203, as amended by EPAAct 2005.¹⁶

¹¹ 16 U.S.C. § 824b(a)(4) (2006).

¹² 18 C.F.R. § 33.2(j) (2012).

¹³ Public Law 109-58. Section 1289(b) of EPAAct provided that the amendment to section 203 would take effect six months after enactment of EPAAct (August 8, 2005).

¹⁴ 16 U.S.C. § 824b (2000).

¹⁵ In this proceeding, Detroit Edison seeks authorization only for its transfer of jurisdictional facilities to ITC in the 2005 transaction. Therefore, we make no finding with respect to Detroit Edison’s assertion that prior authorization under section 203 was unnecessary for ITC’s transfer of distribution assets to Detroit Edison in the 2005 transaction or for Detroit Edison’s transfer to ITC of jurisdictional transmission facilities in the two 2007 transactions.

¹⁶ With respect to the lateness of this filing by Detroit Edison, we have referred this matter to the Commission’s Office of Enforcement for further examination and inquiry as may be appropriate. Detroit Edison is reminded it must submit required filings on a timely basis or face possible sanctions by the Commission.

B. Analysis Under Section 203**1. Effect on Competition****a. Detroit Edison's Analysis**

10. Detroit Edison states that, because the 2005 Disposition involves no disposition of any generating assets, there is no change in market concentration for generation. Therefore, Detroit Edison argues that there are no horizontal market power concerns raised as a result of the 2005 Disposition.¹⁷

11. Detroit Edison states that transmission service over facilities developed and owned by ITC (including the assets subject to the 2005 Disposition) is provided pursuant to MISO's OATT. Therefore, Detroit Edison argues that there are no vertical market power concerns raised as a result of the 2005 Disposition.¹⁸

b. Commission Determination

12. In analyzing whether a transaction will adversely affect competition, the Commission first examines its effects on concentration in generation markets or whether the transaction otherwise creates an incentive to engage in behavior harmful to competition, such as the withholding of generation. The Commission has recognized that transactions involving only the transfer of transmission facilities should not raise competitive concerns.¹⁹ In this case, because the 2005 Disposition does not involve any generating assets, the 2005 Disposition does not affect horizontal market power in the relevant geographic markets. Therefore, we find that the 2005 Disposition will not have an adverse effect on horizontal competition.

13. Second, the Commission considers the vertical combination of upstream inputs to generation, such as transmission or natural gas, with downstream generating capacity. In this case, control over the jurisdictional transmission facilities transferred to ITC in the

¹⁷ Application at 7.

¹⁸ *Id.* at 8.

¹⁹ See Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,903 (recognizing that there is no need for a Competitive Analysis Screen when a transaction only involves a disposition of transmission facilities); *DTE Energy Co.*, 97 FERC ¶ 61,330, at 62,572 (2001) (“anticompetitive effects are unlikely to arise in a transaction that only involves a disposition of transmission facilities”).

2005 Disposition was turned over to MISO.²⁰ Turning over operational control of transmission facilities to an independent entity mitigates any concerns about transmission-related vertical market power because it eliminates a company's ability to use its transmission system to harm competition.²¹ Accordingly, because the 2005 Disposition did not involve any transfer of generation facilities or inputs to electric power generation, we find that it will not have an adverse effect on vertical competition.

2. Effect on Rates

a. Detroit Edison's Analysis

14. Detroit Edison notes that, for the reasons provided in the ITC 203 Order, no adverse effect on rates will result from the 2005 Disposition. Detroit Edison states that the transmission facilities subject to the 2005 Disposition were removed from Detroit Edison's rate base as a result of the 2005 Disposition, and therefore Detroit Edison's rates decreased commensurately.²² Detroit Edison further states that its aggregate disposition of Commission-jurisdictional transmission facilities to ITC outweighed the aggregate acquisition of non-Commission jurisdictional facilities from ITC in the 2005 transaction.²³

b. Commission Determination

15. We note that nothing in the application indicates that rates to customers will increase as a result of the 2005 Disposition, and no customer argues otherwise. Accordingly, in light of these considerations and requirements, we find that the 2005 Disposition will not adversely affect rates.

3. Effect on Regulation

a. Detroit Edison's Analysis

16. Detroit Edison states that in the ITC 203 Order, the Commission determined that the 2005 Disposition would not create a regulatory gap at the federal level because the

²⁰ See ITC 203 Order, 139 FERC ¶ 61,003 at P 14.

²¹ See, e.g., *National Grid plc and KeySpan Corp.*, 117 FERC ¶ 61,080, at P 45 (2006).

²² Application at 8.

²³ *Id.*

Commission retained its regulatory authority over the companies after the 2005 transactions.²⁴ At the state level, Detroit Edison states that the 2005 Disposition will not have an adverse effect as the transmission assets are located entirely in the state of Michigan.

b. Commission Determination

17. We find that neither state nor federal regulation will be impaired by the 2005 Disposition. The Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap at the federal or state level.²⁵ We find that the 2005 Disposition will not create a regulatory gap at the federal level because the Commission will retain its authority over Detroit Edison. We also note that no party alleges that regulation will be impaired by the 2005 Disposition, and that the Michigan Public Service Commission has not asked the Commission to address the issue of the effect on state regulation.

4. Cross-Subsidization

a. Detroit Edison's Analysis

18. Detroit Edison states that, "based on facts and circumstances known to it or that are reasonably foreseeable, ... the 2005 [Disposition] will not result in, at the time of the ... 2005 [Disposition] or in the future, cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company."²⁶ Specifically, Detroit Edison states that:

(a) Detroit Edison's utility assets are not pledged or encumbered except as through its Mortgage and/or general bond issuances such as those routinely used by utilities to raise capital. Detroit Edison will not be issuing additional debt or equity to fund the [2005 Disposition] and the assets subject to the [2005 Disposition] will not be pledged or encumbered in any manner different from that applicable to Detroit Edison's utility assets generally.

(b) The [2005 Disposition] will not result in "[a]ny transfer of facilities between a traditional public utility associate company that has captive

²⁴ *Id.* at 9 (citing ITC 203 Order, 139 FERC ¶ 61,003 at P 21).

²⁵ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

²⁶ Application, Exhibit M.

customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company” because (i) the only facilities to be transferred pursuant to the [2005 Disposition] are the relevant assets, which will be transferred from Detroit Edison to ITC, and Detroit Edison is neither an associate company nor an affiliate of ITC.

(c) The [2005 Disposition] will not result in “[a]ny new issuance of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company” because, as noted above, Detroit Edison will not be issuing additional debt or equity to fund the [2005 Disposition].

(d) The [2005 Disposition] will not result in “[a]ny new affiliate contract between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under sections 205 and 206 of the Federal Power Act.”²⁷

b. Commission Determination

19. Based on the representations as presented in the application, we find that the 2005 Disposition will not result in cross-subsidization, or the pledge or encumbrance of utility assets for the benefit of an associate company. We note that no party has argued otherwise.

20. When a controlling interest in a public utility is acquired by another company, whether a domestic company or a foreign company, the Commission’s ability to adequately protect public utility customers against inappropriate cross-subsidization may be impaired unless it has access to the acquirer’s books and records. Section 301(c) of the FPA gives the Commission authority to examine the books and records of any person who controls, directly or indirectly, a jurisdictional public utility insofar as the books and records relate to transactions with or the business of such public utility. In addition, Detroit Edison is subject to the record-keeping and books and records requirements of Public Utility Holding Company Act of 2005.²⁸ The approval of this transaction is based on such ability to examine books and records.

²⁷ *Id.*

²⁸ 42 U.S.C. § 16451 *et seq.* (2006).

5. Reliability and Cyber Security Standards

21. Information and/or systems connected to the bulk power system involved in this transaction may be subject to reliability and cyber security standards approved by the Commission pursuant to FPA section 215.²⁹ Compliance with these standards is mandatory and enforceable regardless of the physical location of the affiliates or investors, information databases, and operating systems. If affiliates, personnel or investors are not authorized for access to such information and/or systems connected to the bulk power system, a public utility is obligated to take the appropriate measures to deny access to this information and/or the equipment/software connected to the bulk power system. The mechanisms that deny access to information, procedures, software, equipment, and the like, must comply with all applicable reliability and cyber security standards. The Commission, the North American Electric Reliability Corporation, or the relevant regional entity may audit compliance with reliability and cyber security standards.

The Commission orders:

(A) The 2005 Disposition is hereby authorized on a prospective basis, effective from the date of this order, as discussed in the body of this order.

(B) Detroit Edison must inform the Commission within 30 days of any material change in circumstances that would reflect a departure from the facts the Commission relied upon in granting the application.

(C) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates, or determinations of cost, or any other matter whatsoever now pending or which may become before the Commission.

(D) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

(E) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

²⁹ 16 U.S.C. § 824o (2006).

(F) If the 2005 Disposition resulted in changes in the status or the upstream ownership of Detroit Edison's affiliated qualifying facilities, if any, an appropriate filing for recertification pursuant to 18 C.F.R. § 292.207 shall be made.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.